UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SALLIE M., Plaintiff, v. COMMISSIONER OF SOCIAL SECURITY, Defendant.	CASE NO. 3:21-CV-5857-DWC ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of Plaintiff's application for disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 3.

After considering the record, the Court concludes the Administrative Law Judge ("ALJ") did not harmfully err when he evaluated the medical opinion evidence, but Plaintiff's case was adjudicated by an improperly and unconstitutionally appointed ALJ. Thus, this matter is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Social Security Commissioner ("Commissioner") for further proceedings consistent with this Order.

FACTUAL AND PROCEDURAL HISTORY

On February 29, 2016, Plaintiff filed an application for DIB, alleging disability as of December 31, 2011. *See* Dkt. 10; Administrative Record ("AR") 18, 131. Plaintiff's application was denied upon initial administrative review and on reconsideration. AR 191-93, 199-201.

Plaintiff's date last insured is December 31, 2017, making December 31, 2011 through December 31, 2017 the relevant period. AR 162.

ALJ Malcolm Ross held a hearing on September 20, 2017 and issued a decision on May 28, 2018 finding Plaintiff not disabled during the relevant period. AR 44-82, 162-181. On July 22, 2019, the Appeals Council granted Plaintiff's request to review the ALJ's decision, vacated the ALJ's decision, and remanded for further consideration of Plaintiff's residual functional capacity. AR 187-188. ALJ Ross held a second hearing on remand and issued a second decision on November 4, 2020, again finding Plaintiff not disabled during the relevant period. AR 12-43, 83-129. On September 20, 2021, the Appeals Council denied Plaintiff's request to review the ALJ's second decision. AR 1-5.

In Plaintiff's Opening Brief, Plaintiff contends the ALJ erred in evaluating the medical opinion evidence. Dkt. 10, p. 1. Plaintiff also contends her case was adjudicated by an improperly and unconstitutionally appointed ALJ and that this Court should remand for a new hearing with a different ALJ. *Id*.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ Erred in Evaluating Medical Opinion Evidence

Plaintiff contends the ALJ erred in evaluating the medical opinions of Dr. Anne Tuttle and Amanda Kleck, MA, MHP, LMHCA. Dkt. 10, pp. 1-17.

Plaintiff filed her application before March 27, 2017. AR 131, 144. Pursuant to the applicable rules, in assessing an acceptable medical source, an ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). When a treating or examining doctor's opinion is contradicted, the opinion can be rejected "for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at 830–31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

A. Dr. Tuttle

Dr. Tuttle completed a physician statement for Plaintiff in June 2015 and February 2016. *See* AR 1502-07. In both statements, Dr. Tuttle found that Plaintiff is unable to sit or stand for periods longer than 15 minutes without a break and Plaintiff needs to be able to take a break lying down. AR 1503, 1506.

The ALJ rejected Dr. Tuttle's opinion, finding it (1) conclusory and temporary, (2) inconsistent with the overall medical evidence, and (3) inconsistent with Plaintiff's activities. *See* AR 32-33.

With respect to the ALJ's first reason, an ALJ can reject a medical opinion "if that opinion is brief, conclusory, and inadequately supported by clinical findings." *Batson v. Comm'r of Soc. Sec. Admin.,* 359 F.3d 1190, 1195 (9th Cir. 2004). However, the ALJ cannot do so

without considering its context in relation to the medical source's treatment own notes. *See Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014). Plaintiff's medical record included several of Dr. Tuttle's treatment notes. *See* AR 917-922, 925-927, 930, 995, 1061, 1070, 1072, 1075. Before the ALJ could reject Dr. Tuttle's opinion for being conclusory, the ALJ was required to consider the findings of these treatment notes. As the ALJ makes no reference to Dr. Tuttle's own notes, it appears the ALJ rejected her opinion based solely on the statements she provided in the questionnaire. *See* AR 32-33. Because the ALJ's reason finding that Dr. Tuttle's opinion was conclusory and temporary was not supported by substantial evidence, the ALJ erred in rejecting her opinion for this reason.

But, on the second reason, the ALJ did not err in rejecting Dr. Tuttle's opinion for its inconsistency with the rest of the overall medical evidence. *See Batson*, 359 F.3d at 1195 (holding that a treating physician's opinion may properly be rejected where it is contradicted by other medical evidence in the record). Here, the ALJ found Plaintiff's medical record largely showed that Plaintiff "recovered well from her surgeries and her physical examinations revealed unremarkable musculoskeletal and neurological findings." AR 33. In the cited evidence, Plaintiff continuously reported doing well and feeling better after her surgeries. *See* AR 690, 1070, 1284, 1640, 1615. In some of the treatment notes, she reported that due to her improvements after surgery, she was able to be more active and expressed wanting to increase the frequency of her exercises. AR 1292, 1294, 1540. Plaintiff was also often observed as being able to sit and stand without pain, and that her back, ankle, left leg, and knees had improved. AR 829, 848, 854, 927. Considering that much of the medical evidence the ALJ identified showed improvements with Plaintiff's medical conditions after her surgery, the ALJ's finding that Dr. Tuttle's opinion is

inconsistent with the objective medical evidence is supported by substantial evidence. Accordingly, the Court finds the ALJ did not err in rejecting Dr. Tuttle's opinion for this reason.

Because the ALJ has provided at least one valid reason to reject Dr. Tuttle's opinion, the Court finds the ALJ's error in rejecting her opinion for being conclusory harmless. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (including an erroneous reason among other reasons to discount a claimant's credibility does not negate the validity of the overall credibility determination and is at most harmless error where an ALJ provides other reasons that are supported by substantial evidence). Additionally, the Court need not assess further whether the third reason the ALJ provided is erroneous. Even assuming that it is insufficient, the error would be considered harmless as well. *See id*.

B. Amanda Kleck, MA, MHP, LMHCA

On August 24, 2017, Ms. Kleck completed a mental impairment questionnaire about plaintiff's ability to perform work-related activities on a day-to-day basis. *See* AR 1496-1500.

Ms. Kleck found that Plaintiff would be unable to carry out very short simple instructions; understand and remember detailed instructions; carry out detailed instructions; maintain socially appropriate behavior; and interact appropriately with the general public for five percent of the time during a regular workday. AR 1495. She found Plaintiff would be unable to sustain an ordinary routine without special supervision; work in coordination or proximity to others; and ask simple questions for 10 percent of the time during a regular workday. *Id*. She also found that Plaintiff would be unable to deal with normal work stress and set realistic goals for 15 percent of the time during a regular workday. *Id*. Finally, she found Plaintiff would be unable to remember work-like procedures; maintain attention for two-hour segments; maintain regular attendance, accept instructions and respond appropriately to criticism; use public transportation;

deal with stress; and complete a normal workday/workweek without interruptions from psychologically based symptoms for 20 percent of the time during a regular workday.

The ALJ gave Ms. Kleck's opinion "little weight," finding it (1) inconsistent with the overall medical evidence and (2) Plaintiff's activities of daily living. AR 34.

Under the regulations applicable to this case, "only 'acceptable medical sources' can [provide] medical opinions [and] only 'acceptable medical sources' can be considered treating sources." *See* Social Security Ruling ("SSR") 06-03p. But there are "other sources," such as counselors, who are considered other medical sources. *See* 20 C.F.R. § 404.1527(f)(1). *See also Turner v. Comm'r of Soc. Sec*., 613 F.3d 1217, 1223-24 (9th Cir. 2010); SSR 06–3p. Evidence from "other medical sources" may be discounted if, as with evidence from lay witnesses in general, the ALJ "gives reasons germane to each [source] for doing so." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (citations omitted).

With regards to the ALJ's first reason, an ALJ may reject lay witness testimony if it is inconsistent with the overall medical evidence. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). Here, the ALJ specifically found that the medical evidence showed Plaintiff demonstrated intact cognitive functioning and that her symptoms were largely situational and well managed with medications. AR 34. The cited evidence includes a neurological examination showing Plaintiff had normal memory, language, and fund of knowledge, and Plaintiff was able to follow complex, multi-step and cross midline commands. AR 970. Notably, the examination included the observation that "[Plaintiff's] neurocognitive and neurological examinations are completely normal." AR 971. The record also shows Plaintiff's mood was often stable, she responded well to interventions, and that she reported feeling better mentally from her medication or after seeing a psychiatrist.

AR 921, 931, 1041, 1064, 1393, 1350. Finally, the record shows Plaintiff's depression was reasonably managed, and her mental symptoms were often triggered by stress related to her divorce, her ex-husband, and her relationship with her sons. AR 915, 921, 923, 931, 1346, 1352. Given the medical evidence showing Plaintiff's mental impairments were often caused by stressors and well managed by treatment, the ALJ's finding that Ms. Kleck's opinion is inconsistent with the medical evidence is supported by substantial evidence. Accordingly, the Court finds the ALJ gave a germane reason to reject Ms. Kleck's opinion and therefore did not err.

In sum, Plaintiff has failed to establish error in the ALJ's assessment of the medical opinion evidence. However, as explained in the next section, this case must be remanded on other grounds and the ALJ may reconsider the medical evidence to the extent necessary on remand.

II. Whether Plaintiff's Case Was Adjudicated by a Properly Appointed ALJ

ALJ Ross initially presided over Plaintiff's case in 2017 and issued an unfavorable decision in May 2018. *See* AR 44-82, 162-181. The following month, the Supreme Court held in *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018), that the Security Exchange Commission's (SEC) staff appointment of SEC ALJs violated the Appointments Clause of the Constitution because only the President or the heads of agencies could appoint such positions. The Supreme Court also held that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official" who has not already heard the case and ruled on the merits. *See id.* at 2055.

In response to *Lucia*, the Social Security Administration ("SSA") Acting Commissioner preemptively ratified the appointments of all SSA ALJs. *See* SSR 19-1p. Thereafter, the Appeals

Council issued an order vacating ALJ Ross's first decision and remanded Plaintiff's case for further proceedings. AR 1-5. ALJ Ross held a second hearing for Plaintiff's case in May 2020 and issued a second unfavorable decision in November 2020. AR 1-5, 12-43. Then, in April 2021, the Supreme Court applied *Lucia*'s holding in *Carr v. Saul*, 141 S. Ct. 1352, 1356-62 (2021), finding that, like the SEC ALJs in *Lucia*, SSA ALJs were unconstitutionally appointed and Social Security claimants wanting to raise "[Appointments Clause] issues for the first time in federal court are not untimely in doing so."

Plaintiff contends that based on the Supreme Court's decision in *Lucia*, after ALJ Ross's first decision was vacated and her case was remanded for further proceedings by the Appeals Council, ALJ Ross should not have been the one to adjudicate her case again. *See* Dkt. 10, pp. 17-18. But because the Commissioner remanded the case back to ALJ Ross, Plaintiff asks that this Court should remand her case for a *de novo* hearing with a different and properly appointed ALJ. *See id*.

In contrast, the Commissioner contends *Lucia* does not apply to this case because ALJ Ross had been properly appointed prior to Plaintiff's second hearing. *See* Dkt. 11, pp. 2-3. The Commissioner maintains *Lucia* did not hold that "any time an ALJ was involved in a matter prior to ratification, that ALJ is forever barred from participating later." *See id*., p. 4.

In *James R. v. Comm'r of Soc. Security,* No. C20-5632-SKV, 2021 WL 4520560, at *6-7 (W.D. Wash. Oct. 4, 2021), this Court rejected the argument the Commissioner essentially makes now. This Court explained that *Lucia* had "two prerequisites" to properly remedy an "'adjudication tainted with an appointments violation.'" *See id.* (quoting *Lucia*, 128 S. Ct. at 2055). First, a claimant must receive a new hearing before a properly appointed official, and second, the properly appointed official cannot be the same ALJ who initially heard the

claimant's case, even if that ALJ has since received a proper appointment since the initial hearing, or will receive a proper appointment in the future. *See id*.

Here, the Commissioner correctly points out that ALJ Ross was already properly appointed by the time he presided over Plaintiff's second hearing. However, according to *Lucia* and this Court's reading of that case, Plaintiff's case on remand should have been heard not only by a properly appointed ALJ, but also a *different* ALJ. *See id*. Instead, Plaintiff's case was remanded back to ALJ Ross, which effectively "continued—rather than cured—the constitutional violation attendant to the first decision." *See id.*

The Commissioner also maintains *Carr* does not apply to this case because the claimants in that case were challenging the decision of an improperly appointed ALJ, whereas here, the decision at issue was rendered by a properly appointed ALJ. *See* Dkt. 11, pp. 3-4. The Commissioner cites several cases supporting the position that there is no Appointments Clause violation when the same ALJ hears a claimant's case prior to and after his or her appointment's ratification. *See* Dkt. 11, pp. 3-4. But again, the Commissioner's position conflicts with this Court's interpretation of *Lucia*, as well as with the majority of courts that have addressed this issue and similarly concluded that an ALJ's proper appointment after the fact does not remedy his or her earlier improper adjudication. *See Misty D. v. Kijakazi*, No. 3:18-CV-206, 2022 WL 195066, at *3 (N.D.N.Y. Jan. 21, 2022); *Cuminale v. Saul*, No. 20-61004-CIV, 2021 WL 6010499, at *3 (S.D. Fla. Oct. 15, 2021), *adopted*, 2021 WL 5409967 (S.D. Fla. Nov. 19, 2021); *Mary D. v. Kijakazi*, No. 3:20-CV-656 (RAR), 2021 WL 3910003, at *10-11 (D. Conn. Sept. 1, 2021); *Welch v. Comm'r, SSA*, No. 2:20-CV-1795, 2021 WL 1884062, at *3-5 (S.D. Ohio May 11, 2021), *adopted*, 2021 WL 2142805 (S.D. Ohio May 26, 2021). *See also* SSR 19-1p ("In cases in which the [improperly appointed] ALJ made a decision, the Appeals Council

will conduct a new and independent review of the claims file and either remand the case *to an ALJ other than the ALJ who issued the decision* under review or issue its own new decision . . . ." (emphasis added)).

The Commissioner further maintains *Carr* "[does] not relieve a claimant from raising an Appointments Clause claim altogether" and neither *Carr* nor *Lucia* "suggests that an Appointments Clause challenge may survive longer than the decision rendered by the improperly appointed ALJ." *See* Dkt. 11, pp. 4-5. This argument conflicts with the Supreme Court's holding that claimants need not "exhaust certain issues in administrative proceedings" and those who raise an Appointments Clause challenge "for the first time in federal court are not untimely in doing so." *Carr*, 141 S. Ct. at 1362. The Court, therefore, rejects the Commissioner's arguments and orders the Commissioner's final decision be reversed and remanded, with a new hearing be held by a different ALJ.

CONCLUSION

Based on the foregoing reasons, Defendant's decision to deny benefits is reversed and this matter is remanded for further proceedings in accordance with the findings contained herein.

Dated this 9th day of August, 2022.

David W. Christel
United States Magistrate Judge